Supreme Court, U.S.

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No. 94-_____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

VICKI G. HUFNAGEL, M.D.,

Petitioner,

vs.

MEDICAL BOARD OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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December 2, 1994
(Originally Submitted)
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QUESTIONS PRESENTED

1. Is the Due Process Clause of the Fourteenth Amendment violated by a State statute which arbitrarily allows the State's Medical Board to "increase" a proposed penalty thereunder without affording the penalized party an impartial hearing before her license to practice medicine is permanently revoked?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of California are as stated in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Vicki G. Hufnagel, M.D., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINION BELOW

The denial of the Supreme Court of California, en banc, of the Petition for Review is reprinted at Appendix A (A-1).

JURISDICTION

The denial of the Supreme Court of California was filed on September 7, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ca. Gov't Code § 11517:

"(a) If a contested case is heard before an agency itself, the administrative law judge who presided at the

hearing shall be present during the consideration of the case, and if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

Thirty days after receipt of the

proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge, he or she shall prepare a proposed decision as provided in subdivision (b)

upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless

within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100 day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons thereof. The order shall be subject to judicial review

pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney."

SECTION 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, Petitioner recites that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of California is drawn into question and the State of California is not a party.

STATEMENT OF THE CASE

A. Proceedings Below

In 1977, Dr. Hufnagel was licensed by the California Board of Medicine ("Board") as a physician and surgeon (Appendix ("A") 125). Dr. Hufnagel's specialty is obstetrics/gynecology.

On February 26, 1987, the Executive Director of the Board filed its accusation against Dr. Hufnagel, alleging unprofessional conduct based on her treatment of, and billings for, a total of 13 patients. The Board charged Dr. Hufnagel with gross negligence and incompetence with respect to her treatment of seven patients (Marsha C., Jolina C., Rama H., Jan L., Christine S., Joan T. and Marsha W). She was accused of dishonesty or corruption with respect

to her billings for ten patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.) and the consent forms requested of one patient (Debra S.). She was charged with knowingly signing false documents and creating false documents with fraudulent intent in connection with her billings, and in some cases her medical records, for nine patients (Marsha C., Jolina Co., Rama H., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.), and the consent form requested of one patient (Debra S.)[1]

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[1] It is important to note that Dr. Hufnagel prevailed in the following Los Angeles Superior Court actions involving some of the very same patients on which the Board's accusation is based: Jan Ladew v. Vicki Hufnagel, M.D., Los Angeles Superior Court Case No. C 576 072, Judgment for the

It was also alleged Dr. Hufnagel was subject to discipline for the care and treatment rendered with respect to Marsha C., Jolina C., Rama H., Jan L., Christine S., Joan T., Marsha W., Karen G., Deborah S. and Alicia G. The Board's accusations alleged excessive use of diagnostic procedures or treatment with respect to four patients (Jolina C., Jan L., Christine S. and Alicia G.) and insurance fraud with respect to eleven patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence C., Isabell M. and Deborah S.).

A hearing was held before an Administrative Law Judge on 27 separate

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defendant, Vicki Hufnagel; and Rama Haggerty v. Vicki Hufnagel, M.D., Los Angeles Superior Court Case No. C 576 073, Judgment for defendant, Vicki Hufnagel.

days beginning on November 16, 1987, and ending with oral argument on October 20, 1988 (A-334). Both parties were represented by counsel and a substantial amount of evidence, both documentary and oral, was introduced (A-335). On December 30, 1988, the Administrative Law Judge issued his 26-page Proposed Decision, encompassing 63 findings of fact (A 335-410). The Proposed Decision found that Dr. Hufnagel had committed several acts of unprofessional conduct. Specifically, the Administrative Law Judge found gross negligence with respect to the treatment of one patient (Rama H.), among other findings.

The Administrative Law Judge proposed a penalty of five years probation (A 403). The Board, without ever reading the Transcript of

Proceedings, voted not to adopt the Administrative Law Judge's Proposed Decision. On March 6, 1989, the Board issued its Notice of Non-Adoption of Proposed Decision, and permitted the parties to submit written and oral argument (A 317).

On August 14, 1989, the Board issued its decision (A 236-316). In many respects, the Board's decision mirrored the Administrative Law Judge's finding of facts. The Board adopted nearly verbatim the findings of the Administrative Law Judge with respect to the credibility of experts and Dr. Hufnagel. However, the Board's findings differed from those of the Administrative Law Judge in several material respects. In addition to agreeing with the finding of gross negligence as to Rama H., the Board also

found gross negligence with respect to Dr. Hufnagel's treatment of two other patients (Christine S. and Deborah S.). In addition to agreeing with the findings of incompetence as to Jan L. and Christine S., the Board also found incompetence with respect to Dr. Hufnagel's treatment of four other patients (Marsha C., Jolina C., Karen G. and Alicia G.) The Board agreed with one finding of excessive use of diagnostic procedures (Christine S.), yet did not find excessive use of diagnostic procedures with respect to a second patient (Alicia G.). The Board agreed with the Administrative Law Judge as to the five charges of knowingly making false documents and also found that violation to have been established with respect to another patient (Alicia G.).

The Board agreed with the Administrative Law Judge as to all nine findings of dishonesty or corruption. Although the Board made some findings that Dr. Hufnagel created false records with fraudulent intent, no findings of statutory violations were explicitly made nor any discipline imposed for these charges. Likewise, The Board made no findings against Dr. Hufnagel and imposed no discipline for the charges of repeated negligent acts or insurance fraud (A 236-316).

Not all of the charges found proven by the Board had been expressly charged in the accusation. Specifically, the Board determined that Dr. Hufnagel had been grossly negligent with respect to her treatment of Deborah S. and incompetent in her treatment of Karen G.

and Alicia G. Although she had been charged with negligence with respect to these patients, incompetence and gross negligence had not been charged.

The Board did not base its choice of penalty on all the violations taken together as did the Administrative Law Judge. Nor did the Board impose a penalty with respect to each individual violation. Instead, the Board imposed a penalty based on Dr. Hufnagel's treatment of each individual patient (A 236-316). For example, for the established charge of incompetence, dishonesty and false documents in connection with patient Marsha C., the Board imposed revocation. For Dr. Hufnagel's individual treatment of each of five other patients (Jolina C., Rama H., Christine S. Karen G. and Deborah S.), Dr. Hufnagel's license was

separately revoked. For her treatment of each of four other patients (Marsha W., Florence C., Isabell M. and Debra S.), Dr. Hufnagel's license was suspended for 60 days. For her individual treatment of each of two patients (Jan L. and Alicia G.), Dr. Hufnagel was placed on five years probation, with an additional penalty of 60 days suspension for one patient (Alicia G.)

At Dr. Hufnagel's request, the Board's order was stayed until October 13, 1989, in order for Dr. Hufnagel to file a petition for reconsideration. On October 4, 1989, Dr. Hufnagel filed her petition for reconsideration in which she argued the findings were not supported by the evidence and the penalties imposed were unduly harsh. That same day, Dr. Hufnagel filed with the trial court her

petition for writ of mandate under Code of Civil Procedure § 1094.5, and her application for an order staying the Board's decision. On October 12, 1989, a stay was granted (A 231-232). On October 17, 1989, the trial court issued an alternative writ of mandate (A 228-229).

After reviewing the administrative record and the pleading and hearing argument, the trial court issued its ruling on May 18, 1990 (amended nunc pro tunc on June 26, 1990 (A 60)), granting the petition in part (A 68-213). The trial court rejected all of Dr. Hufnagel's procedural challenges to the Board's proceedings. It also rejected her claim that the evidence was insufficient to establish the appropriate standard of care. However, the trial court agreed with Dr. Hufnagel's claim

that the Board's decision was facially deficient in that it failed to clearly disclose the basis for its ruling. The trial court found that the Board did not disclose the basis for its ruling to "the extent that the final decision of [the Board] differs from the recommended decision of the Administrative Law Judge." The trial court concluded that certain findings of violations with respect to the treatment of three patients (Marsha C., Jolina C. and Christine S.), were "entirely conclusory." The trial court determined that those findings must have been improperly based upon the expert opinions of the Board members, and ordered the findings stricken. With respect to findings relating to two other patients (Karen G. and Deborah S.), the trial

court concluded that since there was no explanation for the Board's disagreement with the Administrative Law Judge, whose findings were found to have been supported, such findings were defective and they were likewise ordered stricken. All other findings were found to be supported by the weight of the evidence, after independent review of the record, and were sustained.

With respect to the penalty, the trial court upheld all findings with respect to one patient whose treatment was the basis for an order of revocation (Rama H.). However, without all of the other findings which supported revocation orders, the trial court found no basis for revocation. At the hearing, the trial court stated, "I don't think that this court . . . can be certain and this

court is not convinced that if Rama H. were the only patient involved in this proceeding, that the [B]oard would have ordered unconditional revocation of the doctor's license to practice medicine." (A 203)

The trial court issued a writ (A 62) directing the Board to either strike the improper findings and the revocation and order five years probation, or to modify the decision by replacing the questioned findings with findings setting forth "the reasons for [the Board's] disagreement with the findings of the Administrative Law Judge and the evidentiary basis for such disagreement." (A 63-64) On June 26, 1990, a judgment was entered incorporating these directions. Both parties appealed.

On June 23, 1994, the Court of

Appeal rendered its decision, reversing the judgment of the trial court, and remanding for the trial court to exercise its independent judgment as to whether the Board of Medical Quality Assurance's ("Board") findings Nos. IV, VII, XIII, and LVII are supported by the weight of the evidence and to redetermine whether the Board's decision is supported by the totality of the findings found to be appropriately supported. (A 3-59)

On July 29, 1994, Dr. Hufnagel petitioned the Supreme Court of the State of California for a review of the constitutionality of the Board's actions in imposing a harsher penalty than that recommended by the Administrative Law Judge without conducting an adequate, independent review of this matter, but instead relying upon those findings which

it had elected not to adopt. Said Petition for Review was denied on September 7, 1994. (A 1)

REASONS FOR GRANTING THE WRIT

The sole issue presented here is the constitutionality under the Fourteenth Amendment of a State statute which arbitrarily allows the State's Medical Board to "increase" a proposed penalty thereunder without providing the penalized party an impartial hearing before her license to practice medicine is permanently revoked. The matter is indeed a serious one -- the California Medical Board's proposed penalty is virtually career-ending to Petitioner, a physician and surgeon licensed in the State of California since 1977.

Here, an Administrative Law Judge

oversaw nearly 30 days of live testimony, reviewed documentary, video tape and oral evidence, and, ultimately, rendered his decision: A five-year probation of Petitioner's license--not a revocation. In so doing, the Judge relied upon his impressions of many witnesses--their demeanor, their expertise, their credibility. The Administrative Law Judge was the sole trier-of-fact, charged with listening to live testimony from numerous witnesses, forming opinions, balancing the conflicting testimony and interests of the parties, and reaching what he considered a just and fair resolution of the matter.

Without review of the trial record, the Board voted not to adopt the Administrative Law Judge's proposed decision, a right afforded the Board

under California Government Code §11517(c). Immediately upon the Board's non-adoption, the Administrative Law Judge's decision serves no further function, and, Petitioner here contends, cannot be adopted by the Board when the Board proposed to increase the recommended penalty.

The Board, having never heard from a single witness, voted summarily to disregard the proposed decision but virtually copied certain findings of the Administrative Law Judge to change the result. In short, the Board did not conduct an impartial and fair consideration of the evidence, but instead relied--almost verbatim--upon the Administrative Law Judge's findings to impose a harsher, much harsher, penalty.

If the Administrative Law Judge's

decision served no identifiable function once rejected by the Board, then it in effect became a nullity which could not be adopted by the Board when it increased the penalty proposed. Petitioner contends that is the intent of Government Code §11517: To deny the Board the option of increasing the penalty and adopting the balance of the proposed decision. If the intent of §11517 is otherwise, the statute is unconstitutional as applied, and is vague and ambiguous.

The Board simply "cannot have it both ways." Either the decision is to be adopted as is, or is to be adopted with a reduction in penalty. It cannot be adopted with an increase in penalty.

Once rejected, the Board must make an adequate, independent study of the

facts in issue before rendering its decision. The California Medical Board did not do so.

California Government Code §11517 is unconstitutional as applied if the Board, relying on its provisions, is allowed to increase the proposed penalty and adopt the balance of the proposed decision. Section 11517 is vague and ambiguous since its provisions clearly provide that the California Medical Board may reduce the penalty and adopt the balance of the proposed decision, but does not clearly state that the California Medical Board may not increase the proposed penalty and adopt the balance of the proposed decision.

If allowed to stand, California Government Code §11517 clearly conflicts with the applicable precedents of this

Court as a violation of the fundamental rule that "he who decides must hear" (Morgan v. United States (1936) 29 U.S. 468) and the due process requirement that a final decision be made by an "impartial authority." Applebaum v. Board of Directors (1980) 104 Cal.App.3d 648, 657, 163 Cal.Rptr. 831.

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY CALIFORNIA'S GOVERNMENT CODE § 11517 WHICH ARBITRARILY ALLOWS CALIFORNIA'S MEDICAL BOARD TO "INCREASE" A PROPOSED PENALTY THEREUNDER WITHOUT AFFORDING THE PENALIZED PARTY WITH AN IMPARTIAL HEARING BEFORE HER LICENSE TO PRACTICE MEDICINE IS PERMANENTLY REVOKED.

Petitioner here argues that the intent of California Government Code §11517 is to afford due process rights to an accused by forbidding the California Medical Board to arbitrarily increase a proposed penalty without an impartial

hearing and decision. Such intent has not been carried out in the decision below regarding Petitioner's right to practice medicine. Instead, the California Medical Board has increased the proposed penalty while adopting, nearly verbatim, the balance of the proposed decision. In effect, Petitioner has been denied a "fair" trial.[2]

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[2] This concern was expressed by the Hon. David P. Yaffe, Los Angeles Superior Court Judge, when he noted that it was "at least inferable, since the [Board] didn't have anything before it that the administrative law judge did not, that the medical board was relying upon the expert opinions of its members, or some of its members, in the instances in which it disagreed with the administrative law judge." (A 109)

A. CALIFORNIA GOVERNMENT CODE §11517 IS UNCONSTITUTIONAL AS APPLIED IF THE CALIFORNIA MEDICAL BOARD, UNDER COLOR THEREOF, IS ALLOWED TO INCREASE A PROPOSED PENALTY AND ADOPT THE BALANCE OF THE PROPOSED DECISION.

Under California law, the Board's adoption or non-adoption of the proposed decision of an Administrative Law Judge is governed by Government Code §11517. Section 11517 provides, in pertinent part:

"(b) . . . The agency itself may adopt the proposed decision [of the Administrative Law Judge] in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision." (emphasis added.)

Petitioner contends that the legislature, in enacting §11517(b), intended that an agency could not increase the proposed penalty and still

adopt the balance of the proposed decision. Yet that is exactly what the Board did in this case: The Board elected not to adopt the Administrative Law Judge's recommendation that the penalty be a five-year probation, but adopted the balance of the proposed decision--nearly verbatim--and imposed an increased penalty of revocation of license.

"California law requires that disciplinary hearings of designated state agencies be conducted by administrative law judges from the state Office of Administrative Hearings. (Gov.Code, §11502.) The administrative law judge prepares and submits a proposed decision for the agency's consideration. (Gov.Code, §11517, subd(c).) Although

the agency need not adopt the decision, it is required to review the record of the hearing before arriving at a different conclusion. (Ibid.) These statutory requirements reflect legislative concern with due process and fair hearings in administrative proceedings."

Applebaum v. Bd. of Directors of Barton Mem. Hosp. (1980) 104 Cal.App.3d 648, 659, 163 Cal.Rptr. 831 (emphasis added).

Proof, then, simply cannot exist that an agency independently reviewed the pertinent record if that agency is allowed to adopt the balance of a proposed decision, but increase the penalty as it deems appropriate.

The Court of Appeal correctly noted that "[t]he Board voted not to adopt the

Administrative Law Judge's Proposed Decision." (A 12-13) The Court of Appeal also correctly noted the standard that "from the moment of the agency's rejection thereof, [the Proposed Decision] serves no identifiable function in the administrative adjudication process . . . ." (A 31-32), thus embracing the intent of §11517 that the agency could not increase a penalty and still adopt the "balance of the proposed decision."

Finally, the Court of Appeal recognized that "the Board's decision mirrored the Administrative Law Judge's findings of fact" and "[t]he Board adopted nearly verbatim the findings of the Administrative Law Judge with respect to the credibility of experts and Dr. Hufnagel." (A 13)

Against these facts, and the Court of Appeals' recognition of the appropriate standard of §11517--that once rejected, the proposed decision serves no identifiable function (Compton v. Board of Trustees (1975) 49 Cal.App.3d 150, 158)--it is inconceivable that the Court of Appeals found "the Board's findings were sufficient, and the trial court erred in concluding otherwise." (A 39)

Petitioner contends in compliance with §11517(b), the trial court was indeed correct in "directing the Board to either strike the improper findings and the revocation and order five years probation, or to modify the decision by replacing the questioned findings with [the Board's own] findings . . . ." (A 20-22) In other words, the Board could not, as a matter of law, increase the

penalty and adopt the balance of the proposed decision.

In Hohreiter v. Garrison (1947) 81 Cal.App.2d 384, 184 P.2d 323, "the court distinguished between those cases in which the proposed decision is accepted and those cases in which it is rejected by the decisionmaker." See Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265, 275-276, 269 Cal.Rptr. 404. A non-adopting agency may review the evidence, make its own findings, and "may validly make an award contrary to the referee's recommendation." Nat. Auto. & Cas. Co. v. Ind. Acc. Com. (1949) 34 Cal.2d 20, 30, 206 P.2d 841. Implicit in this finding is that an agency may not adopt findings and still make an award contrary to that recommended.

"[A] total absence of independent

review is inadequate." Vollstedt, 220 Cal.App.3d at 276. Thus, if §11517, as applied, allows the Board in this instance to award its own capricious and overly-harsh penalty and then adopt the balance of the proposed decision, it is unconstitutional.

B. CALIFORNIA GOVERNMENT CODE §11517 IS VAGUE AND AMBIGUOUS BECAUSE IT DOES NOT CLEARLY SET FORTH THAT THE BOARD MAY NOT INCREASE THE PROPOSED PENALTY AND ADOPT THE BALANCE OF THE PROPOSED DECISION.

As indicated, §11517 allows an agency "to adopt the proposed decision in its entirety, or [the agency] may reduce the proposed penalty and adopt the balance of the proposed decision." Government Code §11517(b). The section does not explicitly allow, or forbid, an agency from increasing the proposed

penalty and adopting the balance of the proposed decision.

Accordingly, another basis for finding §11517 unconstitutional is its vagueness and ambiguity, in violation of due process. A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning. Conley v. General Const. Co. (1926) 269 U.S. 385, 391.

The meaning of §11517 is vague and ambiguous because it does not clearly set out whether or not a party may **increase** a proposed penalty and adopt the balance of the proposed decision. As such, the statute is unconstitutional and must be struck down as a violation of constitutionally-protected due process rights.

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C. THE FUNDAMENTAL RULE "HE WHO DECIDES MUST HEAR" IS VIOLATED BY THE CALIFORNIA MEDICAL BOARD'S INCREASE IN PROPOSED PENALTY AND ADOPTION OF THE BALANCE OF THE PROPOSED DECISION.

The fundamental rule that "the one who decides must hear" was mandated by the U.S. Supreme Court in Morgan v. United States (1936) 29 U.S. 468. There, the Court held that where the Secretary of Agriculture did not personally hear or read any of the evidence presented, the constitutional safeguard that "the one who decides shall hear" was not satisfied:

"The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscious to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous consideration

which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

Morgan, 29 U.S. at 472.

In following this long-established constitutional requirement, California courts have insisted that compliance mandates, at a minimum, that "the decisionmaker must review[ ] the record to a sufficient extent to enable [it] to make an informed judgment." Samaan v. Trustees of the Cal. State University & Colleges (1983) 150 Cal.App.3d 646, 197 Cal.Rptr. 856.

Petitioner contends allowing a decisionmaker to increase a proposed penalty, yet still adopt the balance of the proposed decision, violates this fundamental principle that "he who decides must hear." While the principle "does not require that the decisionmaker peruse every exhibit or read every witness's entire testimony," Vollstedt, 220 Cal.App.3d at 276, it does require that altering decisionmaker to set forth its own findings and the evidentiary basis therefor.

The original decisionmaker spends time and effort in weighing credibility, inconsistencies and competing interests. That decisionmaker's proposed penalty is based on his observations and fundamental notions of fairness. To allow a second decisionmaker to discard the proposed

penalty in favor of a much harsher one, without setting forth its own findings and the nature of the evidence relied on, is tantamount to denying a fair "hearing." As so aptly stated in Vollstedt, "whether the trial was 'fair' encompasses post-hearing actions of the agency as well." 220 Cal.App.3d at 273.

D. THE CALIFORNIA MEDICAL BOARD DID NOT ACT AS AN "IMPARTIAL AUTHORITY" IN ARBITRARILY AND CAPRICIOUSLY INCREASING THE PROPOSED PENALTY.

Petitioner has contended, since inception of this action below, that the California Medical Board did not act impartially in meting out a penalty of revocation. Had the Board acted impartially, it would not have arbitrarily increased the penalty of the proposed decision without first making

its own findings. To simply increase the penalty--and drastically so--and adopt the balance of the proposed decision is evidence per se of this Board's bias towards Petitioner.

"Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided." Applebaum v. Bd. of Directors of Barton Mem. Hosp. (1980), 104 Cal.App.3d 648, 656, 163 Cal.Rptr. 831, citing Wong Yang Sung v. McGrath (1949) 339 U.S. 33, 50. Applebaum involved a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations. However, the court recognized that "[t]he distinction between fair procedure and due process rights appears to be one of origin and

not of the extent of protection afforded an individual; the essence of both rights is fairness." Applebaum, 104 Cal.App.3d at 656.

Petitioner contends that the Board could not, and did not, act fairly when it increased her penalty and then proceeded to adopt the balance of the proposed decision. Indeed, the Board increased the penalty from a probation to an outright revocation, thereby affecting Petitioner's right and ability to earn a living for the rest of her life.

The Board did not weigh the evidence, consider the credibility of the witnesses, and balance the differing interests of the parties. Instead, the Board adopted the balance of the decision of the Administrative Law Judge, without explaining its reasons or the justice

thereof. In short, the Board acted with bias and partiality.

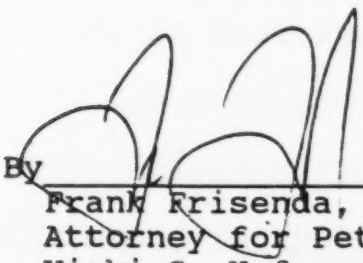
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to strike down California Government Code §11517 as constitutionally violative of Petitioner's Fourteenth Amendment due process rights.

Dated: December 30, 1994

Respectfully submitted,

FRISENDA, QUINTON & NICHOLSON



By _____
Frank Frisenda, Jr.
Attorney for Petitioner
Vicki G. Hufnagel

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, United States of America. I am over the age of 18 and not a party to the within action; my business address is 11755 Wilshire Blvd., 10th Floor, Los Angeles, California 90025.

On December 30, 1994, I served all the parties in the within action the foregoing document described as:

PETITION FOR WRIT OF CERTIORARI

by placing the true copies thereof enclosed in sealed envelopes and deposited via Federal Express addressed as follows:

3 copies - Antonio Merino, Esq.
Office of the Attorney General
300 South Spring Street, Suite 5212
Los Angeles, CA 90013

Supreme Court of the State of California
300 South Spring Street
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service is made.

Executed on December 30, 1994, at Los Angeles, California.

Donna Misenhimer